Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 527.

SOUTHERN PACIFIC COMPANY AND OREGON AND CALIFORNIA RAILROAD COMPANY,
Appellants,

vs.

INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE APPELLANTS.

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Statement.

The Willamette river flows north across western Oregon and empties into the Columbia river at or near the City of Portland. It runs through

large forests of fir and is navigable for one hundred miles from its mouth (Rec., p. 385). The road of the complainants follows the valley of the Willamette throughout its entire length of about one hundred and fifty miles (Rec., p. 385).

Prior to 1899, the lumber along the Willamette had not been cut, largely because it could not compete in the San Francisco market with timber on the tidewater in and around Portland, and partly because of the quality of the lumber, the fir of the Willamette Valley not being as desirable as the pine in other parts of the State.

In that year the Oregon and California Railroad Company decided to foster the lumber industry along the line of its road and to make such a low rate to San Francisco that it would encourage the building of mills throughout the valley (Record, p. 16). There were two courses open to the railroad. Either to wait until the timber in the tidewater had been cut and the lumber in the Willamette Valley came to market in the natural order of things, and at a remunerative rate, or to develop the country and move the lumber at once by making a very low freight rate, to be increased to a fair rate for the service performed

when the lumber industry had become firmly established. The latter policy was adopted, and, after discussing the matter with lumbermen, a rate was made, in the year 1899, of $3.10 per ton from Portland and Willamette Valley points to San Francisco and San Francisco Bay points (Record, p. 17).

At the time this rate was made no lumber was sawed along the Willamette. At the present time, south of Portland, there are two hundred and fifty mills (Record, p. 118), and in one alone, in the year 1906, the cut was over eighty-two million (82,000,000) feet (Rec., p. 71), while the total cut of all the mills in one year is about six hundred million (600,000,000) feet (Record, p. 118). At the present time lumber is worth very nearly twice as much as it was in 1899 (Record, p. 385), while the cost of operating the road of the complainants has increased in about the same proportion. The $3.10 rate of 1899 was a very low lumber rate for an ordinary road (Record, p. 191), but exceedingly so for a road with the tremendous grades of the Oregon and California. The total rise between Portland and San Francisco going either way is over ten thousand (10,000) feet, and in crossing the Siskiyou Mountains there

is a rise of over twenty-three hundred (2,300) feet in fifteen (15) miles (Record, p. 196). The grade is such that helper engines have to be used on two hundred and three (203) miles of the road—sometimes one helper engine and in some places two helper engines in addition to the regular engine (Rec., p. 196). The road is also expensive to operate because of the many washouts due to the mountainous character of the country through which it runs.

This rate, therefore, which had been low in 1899, became in time under the changed conditions unreasonably low, and in January, 1904, the railroad raised the rate to $5 (Record, p. 12).

Upon the representation of lumber interests that they were in bad financial condition the railroad company lowered the rate upon green fir lumber and lath only, to $3.10 per ton. This was done to help the lumbermen through their financial difficulties, and when lumber had gone up in value and the mills were prosperous the rate was restored in April, 1907, to $5, which is in and of itself a low rate for the service performed (Record, p. 191).

Thereupon and in November, 1907, a complaint was filed with the Interstate Commerce

Commission by the Western Oregon Lumber Manufacturers' Association complaining of the $5 rate from Willamette Valley points to San Francisco and praying for a reduction thereof (Record, p. 3), and upon the hearing of this complaint it was developed beyond any possibility of doubt that the $5 rate was in itself reasonable.

On this point counsel for the lumbermen said in answer to questions addressed to him by Commissioner Prouty (Rec., p. 57):

> "COMMISSIONER PROUTY: Let me ask you, Mr. Teal, this question. Suppose that rate had never been lower than 25 cents a hundred pounds, which is $5 a ton, would you claim that this Commission to-day ought to reduce that rate?
>
> "MR. TEAL: No; I don't think I would.
>
> "COMMISSIONER PROUTY: *That is to say, you do not claim the rate is unreasonable in itself?*
>
> "MR. TEAL: *No, I do not.*
>
> "COMMISSIONER PROUTY: You put your case entirely on the ground that these people represented to your clients and to other mill men in the Willamette Valley that they would establish this lower rate for the purpose of building up the industry in that valley, that the industry cannot exist there

in competition with other sections unless that rate is maintained in effect?

"MR. TEAL: Yes, sir.

"COMMISSIONER PROUTY: And therefore the railroad is obliged to maintain it in effect?

"MR. TEAL: It has been maintained for eight or nine years. You have my position exactly, Mr. Commissioner.

"COMMISSIONER PROUTY: That simply shows that it has been maintained and industries have grown up; that the railroad company has during that period elected to maintain it and found it profitable, probably?

"MR. TEAL: You have stated my position exactly. *I am not here complaining about the rates being high or low, because it is a low rate.*"

Again, at page 62 of the Record the point is emphasized that the $5 rate is a low and reasonable rate when Commissioner Prouty says:

"COMMISSIONER PROUTY: That seems to be your case, Mr. Teal. If they can, there is no reason from your statement why the rates should be reduced, *because you say the rate is low enough*, unless those men have been induced to build their mills there, and ought to be protected.

> "MR. TEAL: That is correct. I want you to understand, Mr. Commissioner, that I do not claim the Commission has a right to compel the railroad under ordinary circumstances to meet water rates or any other competition."

Notwithstanding that it was demonstrated by the lumbermen themselves that the $5 rate was reasonable and fair in itself with reference to the service performed, and notwithstanding that the Commission had more than once sustained a higher rate per ton per mile for a longer haul over easily operated roads, the Interstate Commerce Commission by an order dated June 1, 1908, required the railroad companies to desist from charging the $5 per ton rate on green fir lumber from Willamette Valley points to San Francisco and San Francisco Bay points and to put in force between such points a rate not exceeding $3.40 per ton, except from points on the west bank of the river north of Corvallis from which a maximum charge of $3.65 was permitted (Record, p. 27).

There is nothing in the opinion of the Commission which in any way indicates that it considered the $5 rate other than a reasonable rate. It

was agreed that the profits of the lumber business had been very large, Commissioner Prouty saying that "for the last ten years lumber operations upon the Pacific coast had been wonderfully profitable, and these extraordinary profits have led to an abnormal development of the business. What is true of the whole coast is true of the Willamette Valley, but in a somewhat less degree" (Rec., p. 21).

It was agreed that the roads were expensive to operate and at page 21 the Commission says, "all this lumber in reaching San Francisco must be hauled over the Siskiyou Mountains, where grades are extremely heavy and the cost of operation unusually high."

The decision was finally squarely placed upon the proposition that a low rate established by a railroad for the express purpose of encouraging and developing an infant industry could not be raised when the industry had become strong and established, as was the fact in the present case. The point of the decision is found in the following paragraph at page 25 of the Record:

> "No argument and no citation of authority can, however, add to the naked statement of the fact. Take, for example, the

case of Mr. Miles. This gentleman had established a mill upon the strength of the $3.10 rate, which he was operating in the year 1903. He had also made arrangements for the building of another mill and for the purchase of a large tract of timber. Hearing rumors that this rate was to be withdrawn, he suspended his operations. Subsequently, upon being assured by the officials of the Southern Pacific Company that it would continue its former policy, and relying upon the restoration of the rate itself, he resumed the construction of his mill and completed the purchase of his timber. Is it just and reasonable that within less than three years this company shall be allowed to again reverse its policy and to destroy the value of this man's property? We think not; the tremendous interests involved in the stability of railway rates must not be juggled with in this manner."

The circumstances which the Commission is supposed to have considered are that by the establishment of the extraordinarily low $3.10 rate an industry had grown in a few years' time from nothing to the enormous total of a cut of six hundred million (600,000,000) feet of lumber a year worth the fabulous

sum of over twelve million dollars ($12,000,000), and that the price of lumber had doubled in value from 1899 to 1907, and that during the same time the cost of operation to the railroad had greatly increased. This further fact was, we take it, also considered by the Commission, viz., that during this period the Willamette lumbermen had acquired an eastern outlet through Portland, which they did not have before, and that the larger part of their lumber went to eastern markets via Portland, making them independent to a great extent of the San Francisco market, which was their only market when the $3.10 rate was made in 1899. About 7,000 cars of lumber were shipped from the Willamette Valley in 1907 to eastern points via Portland. Less than 5,500 cars went south to California points and of this only 20 per cent. moved under the $3.10 rate. The total shipment of lumber from the Willamette Valley to all points was about 12,500 cars of which only about 1,000 were affected by this proceeding (Record, pp. 20 and 21).

That the decision of the Commission was based upon the novel proposition that it had the general powers of a court of equity was certainly

the opinion of the dissenting members, who, speaking through Commissioner Harlan, said at page 27 of the Record:

> "The $3.10 rate is conceded to have been a low rate, and I do not understand that the present rate of $5 is condemned in the opinion of the Commission as unreasonable in itself and apart from the matters of estoppel on which the opinion seems largely to rest. In my judgment, we are not warranted, under the act to regulate commerce as amended, in condemning a rate upon such considerations. When preference and discriminations are not alleged, the test of the lawfulness of a rate is whether as a rate for the service offered it is reasonable or excessive. This is not the test to which the rate complained of in this proceeding has been subjected as I read the opinion. It is not held to be unlawful on the ground that it is an excessive rate, but is reduced rather because of certain supposed equities existing between the complaining shippers and the defendant carriers. Without enlarging upon this view of the matter it will suffice to say that I do not understand that we are authorized to deal with a rate on those grounds."

After the filing of the order of the Commis-

sion of June 1, 1908, the Southern Pacific Company and the Oregon and California Railroad Company filed under the provisions of the Interstate Commerce Act a bill in equity in the Circuit Court of the United States for the Northern District of California to enjoin the Commission from enforcing said order and to set the same aside (Record, p. 2).

A certificate was then filed in said United States Circuit Court in August, 1908, by the Attorney-General of the United States under the provisions of the Act of Congress of February 11, 1903, commonly called the Expediting Act, asking that the case be given precedence over all other business and be assigned for hearing before not less than three of the Circuit Judges of the Ninth Circuit (Record, p. 29).

Afterwards and in September, 1908, the Interstate Commerce Commission filed its demurrer to the bill of complaint filed by the railroad companies alleging that the act of the Commission was final and conclusive and not reviewable by the courts (Record, p. 30).

Upon argument the demurrer was sustained and thereafter and in October, 1908, the complainants by leave of court filed an amended bill

(Record, p. 32) to which the Commission again filed a demurrer similar to the demurrer interposed to the original bill of the complainants (Rec., p. 51).

Upon the argument of the demurrer to the amended bill the court was divided in opinion as to whether the demurrer should be sustained and as provided by statute certified the whole matter to this Court.

The case came on for argument before this Court upon the certificate of the lower court in October, 1909, and was dismissed upon the ground that the case could not under the circumstances be certified to this Court (*Southern Pacific Company vs. Interstate Commerce Commission*, 215 U. S., 226). The case was remanded to the Circuit Court with directions to proceed therein in conformity with law (Record, p. 362). Thereafter on January 31, 1910, the Interstate Commerce Commission filed a demurrer and answer to the amended bill of complaint (Record, p. 335). Afterwards on March 24, 1910, a final decree was entered dismissing the amended bill of complaint (Record, p. 364), and from said final decree this appeal has been taken.

The important question presented is, whether the Interstate Commerce Commission can exercise the general powers of a court of equity in a matter of purely equitable jurisprudence without review by this or any other court? To put it in another way, is the Interstate Commerce Commission in passing upon the reasonableness of a rate limited in its jurisdiction to whether the rate is reasonable in reference to the service performed, as has always been heretofore supposed, or can it hold a rate unreasonable not at all with regard to the service performed, but because of a supposed estoppel arising out of the past relations between the carrier and shipper, which in no possible way affects the reasonableness of the rate with reference to the value of the transportation furnished?

FIRST POINT.

The Interstate Commerce Commission was without power to order the railroads to desist from charging a $5 per ton rate on green fir lumber from Willamette Valley points to San Francisco and to put in force between such points a rate not exceeding $3.40 per ton.

Any power in the Commission to act upon the complaint of the Western Oregon Lumber Manufacturers' Association is derived from Section 15 of the Interstate Commerce Act as amended June 29, 1906 (34 U. S. Stat., 589) and the only portion of that section of any consequence in this discussion is that which provides that when the Commission

> "shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property . . . *are unjust or unreasonable*, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe

> what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged."

From reading the above it is plain that as a condition precedent to the order entered by the Commission there must have been some finding that the rate before it for consideration was "unjust or unreasonable, or unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation" of the Act, and the whole question comes to this—was there such a finding in this case within the meaning of the words "unjust or unreasonable" as used by Congress, for we may eliminate entirely from our consideration the other words found in the section, as there is no contention that the rate of $5 per ton was "unjustly discriminatory or unduly preferential or prejudicial," or that it in any way violated the act otherwise than that it was "unjust or unreasonable."

Our first interest is to ascertain just what Congress intended by the phrase "unjust or unreasonable." Are these words to be construed in their broadest possible sense or are they qualified by the general purpose of the Act in which

they are found? Are they used as signifying unfair and not right from whatever cause, or do they mean simply that the rate charged must bear a just and reasonable relation to the service performed. Railroads sell transportation just as a merchant sells dry goods, and heretofore it has been supposed that Congress gave power to the Commission to act only when the transportation sold was not commensurate with the rate charged. That is to say, the rate must bear a just and fair and reasonable relation to the transportation furnished—to the service performed. If under some form of paternal government a statute were to enact that a merchant should not charge for his dry goods more than a just and reasonable rate it would require a strong imagination to suppose that this meant more than that the goods should be worth what was asked for them; and it never would occur to anybody that it could mean that the merchant could not increase his price because a man had moved into town attracted by the low price of groceries, if, on the increased price, he sold full value for the price charged.

It would seem as if section 15 of the Commerce Act should be given a plain and sensible construction, and it is inconceivable that Con-

gress intended to vest the full powers of a court of equity in an administrative body with no review of its decision without so declaring in unmistakable words. The Interstate Commerce Act will be searched in vain for any clause indicating that it was the intention of Congress to give to the Commission such extraordinary powers, greater even than any to be found in a circuit court of the United States; for there is a right of appeal from the decrees of a circuit court. It would be strange indeed if Congress intended to depart from the long established principles of jurisprudence and place questions of estoppel by conduct and other strictly equitable questions in the hands of an administrative body without opportunity for review, and it would be stranger still if Congress should do this without one definite word to that effect or anything in the Commerce Act from which such intention could be gathered.

The whole case hinges on this alone—what do the words "unjust or unreasonable" mean? Are we to impute the vesting by Congress of such extraordinary power in an administrative body like the Commission by con-

struing the words in their broadest dictionary sense or are we to assume that Congress never intended to make the Commission a higher judicial body even than a court of equity and give to the words the meaning always heretofore attributed to them, viz : that a rate charged for the transportation of freight must be just and reasonable with regard only to the service performed.

The wording of the first section of the Act would seem to settle the meaning of the words used in section 15 and to dispose entirely of the notion that they were used in anything but a limited sense. The clause of section one of the Act is as follows :

> " All charges made for *any service rendered or to be rendered* in the transportation of passengers or property . . . shall be just and reasonable ; and every unjust and unreasonable charge *for such service* . . . is prohibited and declared to be unlawful."

We, therefore, submit that the words "unjust and unreasonable " must be considered with reference to the purpose and intention of the Interstate Commerce Act, which simply was to place in the hands of an administrative body a

supervision of rates so as to prevent discrimination in favor of one shipper against another and the charging of a rate unless full value was returned therefor in the transportation furnished. The duty of the Commission as declared by the act is to see that there is equality among shippers and that no rate is made which is unjust and unreasonable when considered with reference to what is done by the railroad in return for the money paid it by the shipper, and outside of this the Commission has no interest or duty with regard to rates.

An examination of the circumstances of the case at bar will show that there is no claim made that the $5 per ton rate is " unjust or unreasonable " in the sense that too much was asked for the transportation sold. The facts are that in 1899 the railroad penetrated a forest along the Willamette which it did not pay to lumber, because any fair rate which the railroad should charge, would make competition with timber of better quality upon tidewater points impossible. There were practically no mills in the valley. A broad and generous policy was adopted by the railroad which made the lumbermen rich. A low rate was installed, which was

unremunerative to the railroad, for the sole purpose of developing the lumber interests and permitting them to become established on a firm basis and able to compete with tidewater forests. The rate made was most extraordinarily low, when the mountainous character of the road was considered ; the lowest or one of the lowest ever made in the United States (Record, p. 57). It was made with the express purpose of raising it to a fair rate when the lumber interests were established and fully able to pay a proper charge for the service rendered (Record, p. 331). It would have been idle for the railroads to install this low rate for all time to come. That is practically conceded, for the Commission says in its opinion : " We conclude that these defendants ought to maintain *for the immediate future at least*, substantially the same rate which they have maintained in the past " (Rec., p. 25). Now who is to determine the time when the change of rate should be made ? Are the shippers to decide this or is it for the railroad? If the shippers are to say, then of course the railroad will always have to carry at the unremunerative rate and there never will be any change. As we understand it railroading is still to be re-

garded as a business to be carried on by the officers of the railroad upon common business principles and subject only to an intelligent regulation by the Commission to compel equality in the treatment of shippers and a proper reasonable charge for the work done. Now if the operation of a railroad is still an independent business, it would seem that the time for the change of an unusually low rate (unjust and unreasonable to the railroad considering the service rendered, and made solely to establish a new industry) to a fair and just rate for all concerned was for the railroad to determine and the only possible concern as we look at it which the shippers and the Commission could have in this change is whether the new rate is fair and just in itself.

As was said by Mr. Justice BREWER in *Interstate Commerce Commission vs. Chicago & Great Western*, 209 U. S., 118:

> "It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality

between shippers and communities, yet *in no proper sense is the public a general manager.*"

Now the result of the broad-minded policy of the railroad was beyond anything which had been believed possible. Two hundred and fifty mills sprang up along the Willamette (Record, p. 118). One of these mills alone cut eighty-two million (82,000,000) feet a year (Record, p. 71). All of them cut about six hundred million (600,000,000) feet a year (Record, p. 118). There are five kinds of rough green lumber referred to and their prices given for 1906 in the record (Rec., p. 385) and their average price for the year 1906 is $20.10 a thousand. This would make the yearly cut in the Willamette valley worth twelve million one hundred and twenty thousand dollars ($12,120,000) gross a year to the lumbermen. From nothing in 1899 to a business of twelve million one hundred and twenty thousand dollars ($12,120,000) gross in 1906. During the same period lumber had about doubled in value. Ought not such an enormous industry to pay a fair and just rate for the transportation of its products to market? Isn't now as good a time as any other

to change the rate to a reasonable charge for the service performed? Must the railroads wait another seven years until the business of the lumbermen has reached twenty-five million dollars ($25,000,000) a year? Would not the lumbermen object then just as much as now? And if their objections have any force now, would they not have as much force then?

There are some other important changes which took place during the time from 1899 to 1907, which would seem to make the year 1907 as good a year to establish a reasonable rate for carrying the product of the Willamette mills to market as any other. Not only has the price of lumber doubled, but the cost of the operation of the railroad has increased in the same ratio and now the mill owners have an outlet to the east via Portland through which the largest percentage of their product is shipped, while in 1899 their only market was to the south of San Francisco and vicinity. Their business, therefore, in no way depends upon San Francisco and the rate charged to that point (Record, pp. 20 and 21).

That the rate of $5 per ton is reasonable in itself is admitted in the record by counsel for the lumbermen who said at page 57:

"COMMISSIONER PROUTY: *That is to say you do not claim the rate is unreasonable in itself?*

"MR. TEAL: *No, I do not.*

. . . . . .

"MR. TEAL: You have stated my position exactly. *I am not here complaining about the rates being high or low, because it is a low rate.*"

There is nothing in the opinion of the Commission with reference to the rate of $5 per ton being too high, and in the dissenting opinion of Commissioner Harlan, he says at page 27 of the Record:

> "The $3.10 rate is conceded to have been a low rate, and I do not understand that the present rate of $5 is *condemned in the opinion of the Commission as unreasonable in itself.*"

The Commission itself apparently considered that it was sitting as a court of equity. At least the reasons given for its decision give that impression. At page 25 of the Record it says:

> "We apply our decision entirely to the facts in the case before us. Considering all the circumstances, having in mind the just interests of all parties, we conclude that these defendants ought to maintain, for the immediate

future at least, substantially the same rate which they have maintained in the past."

What the Commission has in fact done is to determine which business shall have the preference, and it has decided as between the lumber interests and the railroad in favor of the former, although it is conceded by the Commission that the lumber business is enormously profitable and that the value of its product has doubled since the $3.10 rate first went into effect in 1899; and it is admitted that the railroad of complainants is expensive to operate, that cost of operation on all roads has increased since 1899 and that the rate of $5 per ton is a just and reasonable rate with reference to the service performed. Is it to be believed that Congress ever intended to place in any administrative body or in any body even if it combined administrative, executive and judicial powers, such extraordinary power to decide as between two business enterprises, which should make a profit and which should not? The very thought of such power being vested in any man or body of men is foreign to American ideas. If this can be done, then why cannot one business be entirely ruined and yet the parties interested have

no redress, if the action of the Commission is not to be reviewed? It is hardly conceivable that we should be seriously arguing the question whether the Commission was authorized to exercise its judgment as to whether the stockholders of a lumber company should have their profits increased at the expense of the stockholders of a railroad. If it was so authorized, then it is open to every business enterprise to attempt to increase its profits at the expense of a railroad.

As everybody knows one of the great objects and purposes of the Interstate Commerce Act was to prevent discrimination and the giving of a preference to one shipper over another. We are now met by the astonishing proposition that, while a railroad is prevented from giving a preference to one shipper over another, it is perfectly proper and within the power of the Interstate Commerce Commission to discriminate in favor of and to give a preference to one class of shippers. No other conclusion can be drawn from the action of the Interstate Commerce Commission in the case at bar. The Commission proposes to compel a railroad to carry lumber for the milling interests of the Willamette Valley at less than a just and reasonable rate

with reference to the service performed, upon the ground that such shippers are entitled to this discrimination because of the establishment by the railroads in 1899 of an unremunerative rate for the purpose of developing the lumber business in the Willamette Valley. All other classes of shippers are required by the Commission to pay a just and reasonable rate *with reference to the service performed*, but this particular class of shippers (lumber men in the Willamette Valley) is permitted by the Commission to pay a rate less than is just and reasonable *with reference to the service performed* because of a supposed estoppel. This, of course, constitutes a preference, and the only possible distinction which can be suggested between this preference and a preference condemned by the Interstate Commerce Act is that the preference given by the Interstate Commerce Commission in the case at bar is to a class and not to an individual. The evil is quite as great, if not greater. An ordinary preference to an individual as against others in the same business is comparatively unimportant when compared to a preference given to a class covering business amounting to over twelve millions of dollars a year. In other

words, the effect of the decision of the Interstate Commerce Commission in this case is to do on a large scale the very thing which the Interstate Commerce Act was designed to prevent.

Suppose that the situation was reversed and that there had been lumber mills and no railroad in the Willamette Valley and that the lumbermen had induced the railroad company to build in the Valley upon the understanding that the railroad should charge a certain rate, and that when the railroad had been built it was evident that the rate was too high, would anybody claim an estoppel in favor of the railroad? Is there any real difference between the present case and the illustration given? Certainly none is apparent, and it merely goes to show that any departure from the plain principle that the rate must be just and reasonable with reference only to the service performed opens the door to controversies that were never intended by Congress to be submitted to the Commission, but are only for the consideration of courts of equity.

In the course of the opinion the Commission says at page 23 of the Record:

> "It is not claimed that the defendants were under contract with any one shipper,

> nor with the general body of shippers in that region to maintain the $3.10 rate. *It is doubtful if such a contract would be valid . . .*"

With this conclusion we agree, and it was so decided by this Court in *Armour Packing Co. vs. United States*, 209 U. S., 56, but what we do not understand is how this case can be in a stronger position than if there had been a contract between carrier and shippers. What is an estoppel? It is an arrangement between parties enforced by a court of equity because of the conduct of the parties. It might perhaps be called a contract or arrangement resulting from conduct. Now if an out and out contract not to do so between shippers and carrier would not prevent the latter from raising a rate, then how is it possible that an estoppel can accomplish this? Further, still, who are the parties to this estoppel? Estoppels are mutual. Certainly a lumberman who opened up a mill in 1906 has no claim of estoppel against the railroad. The country was then developed. The railroad surely owes no obligation to him. On the principle of the decision of the Commission the rate can properly be raised as to him, for it is a reasonable rate in itself. If, however, the

rate is increased as to him, then would be raised the hue and cry of discrimination against him in favor of the other lumbermen. We think the foregoing illustrations fully point out the error of trying to decide cases of rates under general principles of equity and not under the principle declared in the Act that charges must be just and reasonable with reference to the work done and the service rendered.

It is plain that the $5 per ton rate is a fair rate in itself and has been ordered reduced simply upon the theory that a carrier cannot raise its rates after shippers have been persuaded to invest capital on the strength thereof.

Assuming for a moment that the Commission had the power to place its decision on that ground, yet it is difficult to perceive how any such conclusion could be warranted upon the facts in this case, except on the theory, which has been expressly disowned by the Commission, that a rate once established can never be raised by a carrier no matter what the changed conditions may be. As to this the Commission say at page 25 of the Record:

> "We do not hold, as a general proposition, that a railroad company having estab-

> lished and maintained a rate is conclusively estopped from advancing that rate, nor that where a rate is put in for a special purpose it may not be taken out when that purpose has been subserved and new conditions have grown up."

If this theory is abandoned (as it has been) then it is hard to see how there could be any more remarkable change of conditions than is shown in this case between 1899, when the $3.10 rate was made, and 1907, when it was raised to $5 per ton, or how there ever could be any combination of conditions which would warrant an increase of a rate, if not found in the present controversy.

In 1899 no lumber mills in the Willamette Valley. In 1907 two hundred and fifty (250) mills cutting six hundred million (600,000,000) feet a year worth in gross over twelve million dollars ($12,000,000). In 1907 lumber was worth nearly twice what it was in 1899. From 1899 to 1907 the cost of operation of a railroad had increased enormously. Now what should be added to the facts which we have given, in order to warrant an increase of rate. The Commission suggests nothing, and certainly nothing

readily occurs to the ordinary mind. We have a rate unusually low and utterly unfair to the railroad if always to be maintained. The only excuse for its existence was to establish a new industry and then when the mills were on their feet and strong financially to make a rate fair to all concerned, the railroad as well as the shipper. Fostered by this low rate the industry grew almost beyond comprehension. By reason of general conditions the product of the mills doubled in value and the expenses of the railroads increased. We find, therefore, the essential facts to warrant an increase of the low rate made under the peculiar conditions of this case, viz., extraordinary prosperity of shippers and added cost of the service performed by the carriers. We therefore say that even if the Commission was authorized to hold a rate unjust because of certain supposed equities between shipper and carrier, yet such an exercise of that power on the facts before us was error.

We, however, respectfully submit that the Commission was without power to make the order of June 1, 1908, and that the error of assuming that it had such power arose from giving a wrong meaning to the words "unjust or un-

reasonable," found in the 15th section of the Interstate Commerce Act, and from not construing these words with reference to the context, thereby taking to itself the general functions of a court of equity and condemning the rate, not because it was excessive but upon the ground that the carriers were estopped from raising the original rate for the reason that shippers had made investments on the strength of it, and we urge with confidence that Commissioners Knapp and Harlan were right in saying:

> "In my judgment we are not warranted, under the act to regulate commerce as amended, in condemning a rate upon such considerations. When preference and discriminations are not alleged, the test of the lawfulness of a rate is whether as a rate for the service offered it is reasonable or excessive" (Record, p. 27).

SECOND POINT.

The situation in this case is not changed by the proceedings in the lower court since the prior argument of the case before this Court in October 1909.

In the opinion of the court below, it is stated that "the pleadings as changed since the cause was last presented to the court no longer raise the point then made that the rates so fixed were below the cost of transporting the lumber" (Record, p. 365). We do not understand that this is so.

The amended bill still contains the following allegations:

> "Your orators aver that the rates of $3.40 and $3.65 per ton as ordered and prescribed by said Commission were and are unreasonably low rates and will so continue to be during the period fixed for the application of the same by the said Commission and are less than what is and will be during said period just and reasonable for the services rendered, and the said rates do not and will not during said period pay the cost of the service rendered; and that the

> rate of $5 per ton was, is and will be for the period fixed by said Commission no greater than a just and reasonable rate *for the service rendered* in the transportation of rough green fir lumber and lath from points in the Willamette Valley to San Francisco, California, and Bay points" (Record, p. 45).

The Commission in its answer at page 346 makes this allegation:

> "This defendant denies that it did not find the rate of $5. per ton to be unreasonable and it avers that it did find such rate to be unreasonable and unjust."

Everybody concedes that the Commission did find the $5 rate "unreasonable and unjust." The point is, however, that the Commission found this rate to be unreasonable and unjust not *with reference to the service performed;* not because the railroad company did not give full value for the amount received, but because of an estoppel which the Commission says precluded the raising of the rate by the railroad from $3.10 per ton to $5. This is the whole controversy, and the allegations in the answer do not deny or in any way dispose of the allegations of the

bill that the rate of $5 per ton was a just and reasonable rate for the service rendered.

Now, what does the evidence show? Was there anything before the Commission which tended to prove or is there anything in this Record anywhere which tends to prove that the rate of $5 per ton is unjust or unreasonable *with reference to the service performed?*

R. B. Miller, a witness produced on behalf of defendants in the proceeding before the Interstate Commerce Commission, was the General Freight Agent of the lines of the Southern Pacific Company in Oregon, and was familiar with the business of the Southern Pacific Company since his first connection with it in 1899 (Record, pp. 154, 155). At page 191, he was asked as to the justness and reasonableness of the $5 rate with reference to the service performed by the railroad company, and testified as follows:

> "COMMISSIONER PROUTY: Was it your idea, Mr. Miller, that the industry can get along without that rate? Is that the theory on which you withdrew it, that it was an infant industry in 1899, and has become old enough to go alone now?

" MR. MILLER: Yes, sir.

" COMMISSIONER PROUTY: You think this rate is not necessary to that industry at the present time?

" MR. MILLER: No sir.

" COMMISSIONER PROUTY: If it were, would you keep it in? Suppose the Commission is of the opinion that it is, ought the Commission to keep it in?

" MR. MILLER: Of course that is a difficult question to answer, not having all of the circumstances and conditions surrounding the business before us. I couldn't answer that question until I knew just what the conditions might be, not only with respect to the lumber traffic itself but with respect to the general conditions existing in that territory.

" MR. COTTON: You do not intend to reduce the lumber business in the Willamette Valley to nothing and prostrate it? You have no idea of destroying it, have you?

" MR. MILLER: Why, decidedly not.

" MR. COTTON: You do regard the present lumber rate, though, that is the $3.10 rate, as an unreasonably low rate?

" MR. MILLER: Yes sir.

" MR. COTTON: You think it can stand a higher rate?

"MR. MILLER: Yes sir.

"MR. COTTON: And do you regard $5 as a high rate for the services performed?

"MR. MILLER: *I regard $5 as a low rate for that service under the circumstances and conditions.*

"MR. COTTON: *Is that a low rate as compared with other rates, which you are charging on traffic from which you are making your revenue in that territory?*

"MR. MILLER: *It is very much lower.*"

There was no testimony introduced by the lumbermen to show that the $5 rate was unjust and unreasonable *with reference to the service performed.*

Aside entirely from the proposition that the evidence from one end of this Record to the other shows nothing which would indicate that the $5 rate per ton was unreasonable and unjust *with reference to the service performed*, we also find that an examination of the proceedings before the Commission and of the opinion of the Interstate Commerce Commission discloses that throughout the entire proceeding, neither the parties, nor their counsel, nor the Commission itself, supposed that the reasonableness or the unreasonableness of the $5

rate with reference to the service performed was in issue. It was assumed that such rate was reasonable with reference to the service performed. In other words, the whole controversy hinged on the proposition that the rate was in the opinion of a majority of the Commission unreasonable and unjust, not with reference to the service performed, but because of the estoppel arising by reason of the capital invested in the lumber business in the Willamette Valley as a result of the $3.10 per ton rate put in effect in 1899.

If the lumbermen and their counsel had believed this to be an unreasonable rate with reference to the service performed and that what the railroad did in the transportation of this lumber was not a full equivalent for the money paid, would Mr. Teal, representing his clients, have made the following answers at page 57 of the Record:

> "COMMISSIONER PROUTY: Let me ask you, Mr. Teal, this question. Suppose that rate had never been lower than 25 cents a hundred pounds, which is $5 a ton, would you claim that this Commission to-day ought to reduce that rate?

" MR. TEAL : No, I don't think I would.

" COMMISSIONER PROUTY : *That is to say, you do not claim the rate is unreasonable in itself?*

" MR. TEAL : *No, I do not.*

" COMMISSIONER PROUTY : You put your case entirely on the ground that these people represented to your clients and to other mill men in the Willamette Valley that they would establish this lower rate for the purpose of building up the industry in that valley ; that the industry cannot exist there in competition with other sections unless that rate is maintained in effect ?

" MR. TEAL : Yes, sir.

" COMMISSIONER PROUTY : And therefore the railroad is obliged to maintain it in effect ?

" MR. TEAL : It has been maintained for eight or nine years. You have my position exactly, Mr. Commissioner.

" COMMISSIONER PROUTY : That simply shows that it has been maintained and industries have grown up ; that the railroad company has, during that period, elected to maintain it, and found it profitable, probably ?

" MR. TEAL : You have stated my posi-

tion exactly. I am not here complaining about the rates being high or low, *because it is a low rate*."

In his last answer just quoted, when Mr. Teal says "*because it is a low rate*," he was referring to this $5 rate per ton, and it is out of the question that he should have been willing to state to the Commission that this $5 rate was a low rate if he thought and supposed that such rate was unreasonable and unjust *with reference to the service performed.*

Mr. Teal does not make this statement once only, but he again emphasizes his opinion that the $5 rate per ton is a low rate, for he says at page 62 as follows:

"COMMISSIONER PROUTY: That seems to be your case, Mr. Teal. If they can, there is no reason from your statement why the rates should be reduced, *because you say the rate is low enough*, unless those men have been induced to build their mills there, and ought to be protected.

"MR. TEAL: That is correct."

Now when counsel made the opening statement for the railroads, he clearly and specifically

asked Mr. Teal, the counsel for the lumbermen, whether it was his understanding that the $5 rate was a just and reasonable rate in and of itself; that is to say, a reasonable rate with reference to the service performed, and again counsel for the lumbermen conceded that it was. As to this it was said at page 63:

> "MR. COTTON: I understand Mr. Teal takes the position and therefore we will proceed upon that theory that this $5 rate is not an unreasonable rate in and of itself. That is my understanding. Is it yours?
>
> "MR. TEAL: Yes, I think I would say that.
>
> "COMMISSIONER PROUTY: Mr. Teal says if the $5 rate had been in effect for the last ten years he would not ask us to reduce it. It may be they have made a profit. That probably is so; but he does not claim it is an unreasonable rate."

Now it is certain that in his own opening, and upon the opening of this proceeding for the railroad, the counsel for the lumbermen took the position that the $5 rate was not an unreasonable rate *with reference to the service performed.* It is immaterial that subsequently Mr. Teal un-

dertook to limit and qualify his clear admission of this fact. The qualification and limitation mean nothing in view of the fact that in the course of the proceeding, Mr. Teal never undertook by any testimony of witnesses or by any documentary evidence to show that the rate of $5 per ton was unjust or unreasonable *with reference to the service performed.*

Just before the beginning of the testimony, Commissioner Prouty asks this question of Mr. Teal at page 69 of the record:

> "COMMISSIONER PROUTY: . . . They have a rate to the east. For what reason is not that rate as valuable to them as it is to Portland and other mills, and to what extent is it necessary that this rate should be maintained to San Francisco in order to fairly continue the prosperity of these establishments?
>
> "MR. TEAL: That is where I intend to confine my testimony."

In other words, Mr. Teal makes the statement to the Commission that he intends to confine his testimony to the question—whether the $3.10 rate should be maintained in order to continue the prosperity of the mills. He is as good as

his word, and nowhere in the record does he undertake to show that the $5 rate is unjust and unreasonable *with reference to the service performed*, but the evidence introduced by him is all directed to showing the $5 rate unjust and unreasonable because the mills have been established on the faith of the $3.10 rate and that therefore such rate should be continued.

It is apparent that everybody understood that the evidence of Mr. Teal would be confined to this one question, and that he would not undertake in any way to show that the $5 rate was unjust and unreasonable with reference to the service performed. This is shown by the general objection to this entire line of testimony made by counsel for the railroad companies, at page 69 of the Record, where he said:

> "MR. DILLARD: In order that we may get it in the record,—I do not know that it will be necessary at all—I desire at this time to interpose a special exception and objection to the introduction of any testimony on that line, on the grounds that if the rate is reasonable, the railway company has the right to make it, irrespective of what might be the effect of it; second, that there can be no estoppel upon a railroad from

making a reasonable rate, irrespective even of the fact, if it were a fact, that a contract had been entered into that the rate would not be changed; that the matter of making rates must be determined by the conditions as they exist at any given time by the law then in force; that any contract, if there were a contract theretofore made, could have no effect, and that the evidence proposed to be introduced is in all respects irrelevant and immaterial. I presume, of course, the evidence will be admitted, but I want to make the objection at this time in this way, that I may not seem to be interrupting the counsel.

"COMMISSIONER PROUTY: The evidence will all be received subject to the objection of Mr. Dillard. Of course, in overruling the objection and receiving the evidence, the Commission expresses no opinion upon the question involved, but that evidence seems to be pertinent to Mr. Teal's claim."

After the case was opened before the Commission and throughout the testimony there appears from time to time a statement of some member of the Commission as to what he considers the issue being tried. At page 92 of the Record, in answer to counsel for the railroad as

to what the basis of the claim of the lumbermen was, Commissioner Prouty makes this statement:

> "COMMISSIONER PROUTY: Oh, no, the whole basis of his claim is that you have put in a rate and he built his mill on the strength of that rate and is entitled to his rate. If he made a good trade he is entitled to that."

Again, at page 96, Commissioner Prouty asked one of the witnesses as follows:

> "COMMISSIONER PROUTY: So that really you did not expect that rate to last forever, but as long as conditions were the same?"

At page 117 of the Record, the question before the Commission is again stated as follows:

> "COMMISSIONER PROUTY: I do not think Mr. Booth testified to any understanding which could be regarded in the light of a contract or in estoppel or anything of that sort, except in so far as the railroad company which puts in effect and maintains in effect a certain rate may be held to be in a sense estopped or excluded from changing

that rate after an industry has been built up and strengthened."

Subsequently, at page 132 of the Record, in a controversy between the Commission and counsel as to the line of evidence introduced in the case, Commissioner Prouty says:

"COMMISSIONER PROUTY: That general fact is important; but not the fact that this individual member did that perhaps. He is not standing here asking us to enforce some contract with the Southern Pacific road, and he is not asking that the Southern Pacific road be estopped from putting in this rate as to him in particular. *The simple question here is what is the fair thing to be done with reference to these mill owners.*"

Towards the end of the case Commissioner Prouty, at page 192 of the Record, in speaking of the question of the change in the rate from $3.10 per ton to $5 per ton, says:

"COMMISSIONER PROUTY: Mr. Teal, it is a very important situation in this case as to how far the Southern Pacific may consult its own judgment in these matters and as to how far that judgment can be controlled by the Commission. That is the thing for you gentlemen to argue."

The foregoing quotations from the record in this case show beyond question that the only matter considered by the Commission was whether this $5 rate was unjust and unreasonable because of the establishment of the lumber industries in the Willamette Valley on the faith of the $3.10 rate. That is to say, no question as to the justice of the $5 rate *with reference to the service performed* was considered to be before the Commission.

This view of the matter is further strengthened by the opinion of the Commission itself, which is prefaced by the following syllabus:

> " 1. Where a rate has been established and maintained for a considerable period for the purpose of developing a particular industry and with full knowledge that the industry could not be developed without it, and where, under the influence of such rate, large amounts of money have been invested in property the value of which must be seriously impaired by an advance of the rate, that fact is an important consideration in passing upon the reasonableness of such advance.
>
> " 2. The Southern Pacific Company established a rate of $3.10 per ton upon rough

> green fir lumber and lath from points in the Willamette Valley to San Francisco for the purpose of developing the lumber industry in that section, and maintained the rate in effect, with a brief interval, for six years; and on the strength of this rate that industry attained considerable proportions. In April, 1907, this rate was advanced to $5 per ton; Held, that the advance was unreasonable and that the rate ought not for the future to exceed $3.40 per ton."

There is no doubt but that the syllabus of the Report of the Commission correctly states what was decided in the body of the decision. There is nothing in the report which indicates in any way that the Commission was of the opinion that the $5 rate was in and of itself unjust and unreasonable *with reference to the service performed.*

It is true that at the conclusion of the Report, the Commission does say:

> "We are of the opinion then that the present rate of $5 from all mills in the Willamette Valley not including Portland is unjust and unreasonable" (Record, p. 26).

But as we have before pointed out with reference to the allegation in the answer of the Com-

mission upon this point, the Commission has been very particular not to say that this rate was unjust and unreasonable *with reference to the service performed.*

Moreover this quotation is every word that the Commission says in its report with reference to the reasonableness and justness of the $5 rate. The expression of the Commission at page 22 of the Record, "that the $3.10 rate was certainly a low one, but we are satisfied that it yielded when established, that it has always yielded, and would in the future yield a substantial return over and above the cost of operation, and that its maintenance in the past has contributed much to the prosperity of the defendants," is not inconsistent with the statement which we now make that nowhere in the report does the Commission object to the rate of $5 as being unreasonable and unjust *with reference to the service performed.*

Our construction of the Report of the Commission is certainly confirmed by the dissenting opinions of Messrs. Harlan and Knapp, who say that they—

> "do not understand that the present rate of $5 is condemned in the opinion of the

> Commission as unreasonable in itself and apart from the matters of estoppel on which the opinion seems largely to rest" (Record, p. 27).

It may be now contended by the Government that even if the report and finding of the Commission cannot be sustained for the reasons given, yet it can be upheld because as a matter of fact the rate of $5 is unreasonable and unjust *with reference to the service performed.* The difficulty with this is that no evidence has been introduced upon the subject, except the evidence of the railroads that it is a just and reasonable rate for the service performed (Record, p. 191). In the absence of any evidence how is it possible for this Court to so find? Further than that how can this Court, at this late day, be seriously asked by the Government to now find the $5 rate unreasonable and unjust *with reference to the service performed* when the allegation of the amended bill that "the rate of $5 per ton was, is and will be for the period fixed by the Commission no greater than a just and reasonable rate for the service rendered" (Record, p. 45) was never denied by the Government in the answer of the Interstate Commerce Com-

mission. The Commission does say in its answer that it "denies that it did not find the rate of $5 per ton to be unreasonable, and avers that it did find such rate to be unreasonable and unjust" (Record, p. 346), but it was most careful not to say that it found the rate unreasonable *with reference to the service performed.* Everybody knows that the Commission held the rate unreasonable, but upon the sole ground of the large amount of capital invested by the lumber mills on the strength of the $3.10 rate. If the Commission had not the courage to deny in its answer that the rate was reasonable and just *with reference to the service performed*, how can it have the assurance to ask this Court to find without any evidence before it that the $5 rate was unjust and unreasonable *with reference to the service performed.*

Our position further is that the Commission is obliged to stand on its order and the reasons given by it therefor. The carrier is alone given the right by the Interstate Commerce Act to bring a proceeding to set aside or modify the Commission's order. It is therefore not open to the Government to now come in and dispute the question of the reasonableness of the $5 rate when in the entire proceeding before the Com-

mission it was conceded that the rate was in and of itself just and reasonable. That is to say the Government must stand on the order of the Commission and the reasons given by the Commission therefor.

It may be that the Government will take the position that the rate ordered by the Commission is not confiscatory and that therefore it cannot be reviewed in any way in the courts. As we look at it, the words "confiscation" and "confiscatory" are simply confusing, and do not help in any way in the determination of what is or what is not a matter of investigation by the courts. There are no such words in the federal constitution, nor in any federal statute. The provision of the constitution is that no man shall be deprived of his property without due process of law. The property of the individual cannot be taken from him for a public purpose without just compensation, no matter how small in value it may be, and no matter how great his remaining wealth. All that is necessary is that something which is his property should be taken from him for a public purpose without just compensation and therefore without due process of law in order that he may come within the protection of the con-

stitution. The individual is in no better position than the corporation. They stand so far as the provisions of the constitution go upon the same ground and if property of a carrier is taken from it without just compensation, and therefore without due process of law, it is utterly unimportant as to the extent of this property so taken. If a carrier is not permitted to charge a rate which is just and reasonable *with reference to the service performed*, then its property is taken from it contrary to the provisions of the Constitution. That the extent of such deprivation is such as to create a confiscation of its property is unimportant. The single question is whether its property is taken without due process of law, and if it is, then it comes within the prohibition of the Constitution.

Some theory may be advanced as to the railroad company making a profit from its general business, and that therefore a reduction of the $5 rate necessarily does not result in the confiscation of the property of the railroad. We do not understand that this theory has ever received the approval of this Court. On the contrary, we understand that it has received the disapproval of this Court in the case of *Cotting vs. Kansas City Stock Yards*, 183 U. S., 79.

The claim is illogical and if consistently followed leads to absurd conclusions. If a rate which is less than a just and reasonable rate *with reference to the service performed* is to be deemed not confiscatory and not a violation of the provisions of the constitution simply because the whole business of the carrier yields a profit, then it would necessarily seem to follow that a rate which was utterly unfair and unjust and exorbitant when considered with reference to the services performed must be considered a proper rate if on its entire business the railroad is losing money. If one position is correct then the other must be also. This whole subject was fully discussed in the *Cotting Case*, *supra*, and the view now suggested by the Government was dismissed by this Court as being too narrow. At page 95, Mr. Justice BREWER speaking for the Court says:

> "Pursuing this thought, we add that the State's regulation of his charges is not to be measured by the aggregate of his profits, determined by the volume of business, but by the question whether any particular charge to an individual dealing with him is, *considering the service rendered*, an un-

reasonable exaction. In other words, if he has a thousand transactions a day and his charges in each are but a reasonable compensation for the benefit received by the party dealing with him, such charges do not become unreasonable because by reason of the multitude the aggregate of his profits is large. The question is not how much he makes out of his volume of business, but *whether in each particular transaction the charge is an unreasonable exaction for the services rendered.* He has a right to do business. He has a right to charge for each separate service that which is reasonable compensation therefor, and the legislature may not deny him such reasonable compensation, and may not interfere simply because out of the multitude of his transactions the amount of his profits is large. Such was the rule of the common law even in respect to those engaged in a quasi public service independent of legislative action. In any action to recover for an excessive charge, prior to all legislative action, who ever knew of an inquiry as to the amount of the total profits of the party making the charge? Was not the inquiry always limited to the particular charge, and whether that charge was *an unreasonable exaction for the services*

rendered? As was said by Mr. Justice BRADLEY, in *Transportation Co. v. Parkersburg*, 107 U. S., 691, 699:

"'It is also obvious that since a wharf is property and wharfage is a charge or rent for its temporary use, the question whether the owner derives more or less revenue from it, or whether more or less than the cost of building and maintaining it, or what disposition he makes of such revenue, can in no way concern those who make use of the wharf and are required to pay the regular charges therefor; provided, always, that the charges are reasonable and not exorbitant.'

"In *Canada Southern Railway Co. v. International Bridge Co.*, 8 App. Cas., 723, 731, Lord Chancellor SELBORNE thus expressed the decision of the House of Lords:

"'It certainly appears to their Lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, *but what it is reasonable to charge to the person who is charged.* That is the only thing he is concerned with. They do not say that the case may not be imagined of the results to a company being so enormously disproportionate to the money laid out upon the undertaking as to make that

of itself possibly some evidence that the charge is unreasonable, with reference to the person against whom it is charged. But that is merely imaginary. Here we have got a perfectly reasonable scale of charges in everything which is to be regarded as material to the person against whom the charge is made. One of their Lordships asked counsel at the bar to point out which of these charges were unreasonable. It was not found possible to do so. In point of fact, every one of them seems to be, when *examined with reference to the service rendered* and the benefit to the person receiving that service, perfectly unexceptionable, according to any standard of reasonableness which can be suggested. That being so, it seems to their Lordships that it would be a very extraordinary thing indeed, unless the legislature had expressly said so, to hold that the persons using the bridge could claim a right to take the whole accounts of the company, to dissect their capital account, and to dissect their income account, to allow this item and disallow that, and, after manipulating the accounts in their own way, to ask a court to say that the persons who have projected such an undertaking as this, who have encountered all the original risks of executing it, who are

still subject to the risks which from natural and other causes every such undertaking is subject to, and who may possibly, as in the case alluded to by the learned judge in the court below, the case of the Tay Bridge, have the whole thing swept away in a moment, are to be regarded as making unreasonable charges, not because it is otherwise than fair for the railway company using the bridge to pay those charges, but because the bridge company gets a dividend which is alleged to amount, at the utmost, to 15 per cent. *Their Lordships can hardly characterize that argument as anything less than preposterous.*'

" The authority of the legislature to interfere by a regulation of rates is not an authority to destroy the principles of these decisions, but simply to enforce them. Its prescription of rates is *prima facie* evidence of their reasonableness. In other words, it is a legislative declaration that such charges are reasonable compensation for the services rendered, but it does not follow therefrom that the legislature has power to reduce any reasonable charges because by reason of the volume of business done by the party he is making more profit than others in the same or other business. The question is always not what does he make as the aggregate of his

> profits, *but what is the value of the services which he renders to the one seeking and receiving such services.* Of course it may sometimes be, as suggested in the opinion of Lord Chancellor SELBORNE, that the amount of the aggregate profits may be a factor in considering the question of the reasonableness of the charges, but it is only one factor, and is not that which finally determines the question of reasonableness. Now, the controversy in the Circuit Court proceeded upon the theory that the aggregate of profits was the pivotal fact. To that the testimony was adduced, upon it the findings of the master were made, and in recognition of that fact the opinion of the court was announced. Obviously, as we think, in all this the lines of inquiry were too narrowly pursued."

We know of no subsequent decision which in any way conflicts with the views of Mr. Justice BREWER expressed in his discussion of this question in the *Cotting Case.*

We therefore submit with confidence that the case now presented on the merits is precisely the same case which was argued before this Court in October, 1909. The proceedings in the court below have made no change. It appears now as

then that, taking the whole record, there is no question but that the Interstate Commerce Commission held the $5 rate to be unreasonable and unjust solely upon the ground that it was unfair to the lumber mills after the investment of capital on the faith of the $3.10 rate to raise the rate to $5. It is not possible to gather from the record that the Commission ever considered the question of the reasonableness or unreasonableness of the $5 rate *with reference to the service performed.* Even if it was open to the Commission to sustain its order upon grounds other than those given for its decision, yet it is impossible so to do unless somewhere in the record there can be found something to sustain the new grounds offered. No such evidence appears in the testimony. In the Report of the Commission, and in its answer to the bill of complaint herein there is nothing to show that the Commission deemed the $5 rate unreasonable and unjust *with reference to the service performed.* Therefore the single question before this Court is whether the Interstate Commerce Commission has the power under the Commerce Act to hold a rate unreasonable and unjust solely upon the equitable ground of estoppel.

THIRD POINT.

The expiration of the order of the Commission before the argument of this case does not require the dismissal of this case upon the ground that it has become a moot question.

This question has been fully argued in the Fifth Point of the Notes of Argument filed in behalf of the appellants in Cases No. 459 and No. 460 on the docket of this Court, which have been set for argument just prior to this case, to which the Court is respectfully referred, and for the reasons there given we think that this Court should not dismiss this appeal.

FOURTH POINT.

The judgment of the Court below should be reversed.

MAXWELL EVARTS,
F. C. DILLARD,
Counsel for Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

SOUTHERN PACIFIC COMPANY AND OREGON AND CALIFORNIA RAILROAD COMPANY, appellants,
v.
INTERSTATE COMMERCE COMMISSION.
No. 527.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

STATEMENT OF THE CASE.

This appeal is from a decree of the Circuit Court of the United States for the Northern District of California, dismissing the bill of complaint of the railroads and sustaining an order of the Interstate Commerce Commission with respect to rates for the carriage of certain grades of lumber from points in the Willamette Valley, Oregon, to San Francisco.

The same case was here at the last term of this court on the certificate of the judges of the court below that they were divided in opinion as to whether

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the demurrer of the Interstate Commerce Commission to the bill of complaint of the railroads should be sustained (Rec., 53), and this court dismissed the certificate and remanded the case to the Circuit Court for further proceedings on the ground that notwithstanding the provisions of the so-called expediting act of February 11, 1903 (32 Stat., 823, there was no authority for certifying the whole case to this court without the rendition of any judgment, opinion, or decision below. (*So. Pac. Co.* v. *Interstate Commerce Com.*, 215 U. S., 226.)

In obedience to the mandate of this court (Rec., 362) further proceedings were had in the court below; the demurrer of the Interstate Commerce Commission was, by leave of court, withdrawn (Rec., 374); a demurrer and answer on behalf of the Commission was filed (Rec., 335–346); a replication to such answer was made (Rec., 361); and, finally, the court, coming to hear the case upon the bill of complaint, the answer, the replication, and the proofs, dismissed the bill and entered a decree for the Commission (Rec., 364). The opinion below was unanimous and appears in full in the record (p. 365–374).

The chief difference between the case as presented at the first hearing below, when the judges were divided in opinion, and as finally considered, when the unanimous judgment was rendered in favor of the Commission, which is now here for review, is that on the first hearing the railroads alleged in their bill of complaint that the rates fixed by the Commission

would not pay the cost of the service rendered (Rec., 45), and to this, among other allegations, the Commission demurred (Rec., 51, 52), whereas at the last hearing this demurrer was withdrawn and an answer filed expressly denying that the rates fixed by the Commission would not pay the cost of the service rendered and averring that the rates so prescribed are just and reasonable, are fully remunerative to the railroads and produce a fair return for the service performed (Rec., 345, 346).

THE ISSUES INVOLVED.

It is not necessary to enter upon a detailed history of this controversy. The salient questions in the case may be very briefly stated.

In 1899 the Southern Pacific and the Oregon and California railroads fixed a rate of $3.10 per ton for the transportation of all kinds of lumber from the Willamette Valley and Portland to San Francisco and bay points. In 1903 they advanced the rate to $5 per ton. In 1904 they restored the rate to $3.10 per ton, upon rough green fir lumber and laths only, from the Willamette Valley to San Francisco. In 1907 they again advanced the rate to $5. A complaint was filed with the Interstate Commerce Commission by the Western Oregon Lumber Manufacturers' Association and others against the Southern Pacific and Oregon and California railroads, and the Commission, after a full hearing, made an order in June, 1908, fixing a rate not to exceed $3.40 per ton for the transportation of green fir lumber and laths,

in carloads, from points on the east bank of the Willamette River and upon the west bank south of Corvallis, and a rate not exceeding $3.65 per ton for such transportation from points on the west bank of said river north of Corvallis to San Francisco and bay points.

The railroads complain of this order on three grounds:

> First. That the Interstate Commerce Commission was without authority to fix any rates whatever;
>
> Second. That the Commission did not establish the new rates because the old rate was unreasonable or because the new rates were reasonable, but simply because the railroads had promised and long maintained a lower rate; and
>
> Third. That the rates established by the Commission are asserted by the railroads to be unreasonably low, unremunerative, and even below the cost of service.

Under the first objection, that the Commission was without authority to establish any rate, the railroads contend that the interstate-commerce act is unconstitutional in that it delegates legislative power to the Commission; unites in one body legislative, judicial, and executive functions; imposes penalties so severe as to amount to a deprivation of property without due process of law; and, finally, that the fixing of a rate is not a regulation of interstate commerce. Our answer is that the validity of the interstate-commerce act in all these particulars is fully sustained by decisions of this court.

Under the second objection, that the Commission prescribed these rates without regard to reasonableness and simply on some equitable principle of estoppel between the railroads and the shippers, counsel for the appellants pick out various observations of members of the Commission who heard the case, statements of counsel for the complainants, and certain language in the opinion of the commissioner who wrote the report, contending from these circumstances that the only reason which influenced the Commission in reducing the rate was that the railroads had induced numerous lumber manufacturers to set up their mills and industries in the Willamette Valley upon the faith of the $3.10 rate, originally established by the carriers; to invest hundreds of thousands of dollars in such enterprise and to purchase thousands of acres of timber land, yielding annually many millions of feet of lumber; and that for the railroads subsequently to raise this rate to $5 and thus completely to destroy the business of the shippers, was so unfair as to justify the restoration of some rate under which the business could continue.

Our answer to this is that no expressions in the opinion of the Commission can be used to defeat its order if its order is otherwise lawful; that the power of the Commission to make an order reducing rates can not be affected by the fact that its order would also secure the establishment of rates which the railroads themselves were under a moral obligation to maintain; and finally, that the Commission in its report and order expressly finds from the evidence

that, independently of any promise on the part of the railroads, the $5 rate is unjust and unreasonable and the rates of $3.40 and $3.65, respectively, as prescribed by the Commission, are just and reasonable and will afford a fair return to the carriers.

As to the third objection, that the rates established by the Commission will not produce a fair return or will require a service below cost, our answer is that this is merely the assertion of the railroads. It is contrary to the express finding of the Commission; it is specifically denied in the Commission's answer, and there is no testimony whatever in the record either proving or tending to prove such an allegation.

ARGUMENT.

Before discussing the merits of this case, the attention of the court ought to be called to the fact that the order of the Commission here involved expired on August 15, 1910, two years after the order was made effective (Rec., 35), or at the latest, October 15, 1910, two years from the postponed date at which the order was made to go into effect (Rec., 36).

There being no order of the Commission now in force, and nothing upon which the judgment of this court could operate, this appeal presents merely a moot question, and should be dismissed.

Mills v. *Green*, 159 U. S., 651.
California v. *Railroad*, 149 U. S., 308.
San Mateo v. *Railroad Co.*, 116 U. S., 138.
Little v. *Bowers*, 134 U. S., 547.
Board v. *Glover*, 160 U. S., 170.
Pennsylvania v. *Bridge Co.*, 18 How., 421.

Dinsmore v. *Southern Express Co.*, 183 U. S., 115.

Jones v. *Montague*, 194 U. S., 147.

Richardson v. *McChesney*, No. 23, this term, decided November 28, 1910.

That the expiration of an order of the Interstate Commerce Commission pending proceedings in the courts brought to set aside the order, presents merely a moot case, is more fully discussed in the brief for the Interstate Commerce Commission in cases Nos. 459 and 460 of this term. (*Southern Pacific Terminal Co. et al.* v. *Interstate Commerce Commission et al.* and *E. H. Young* v. *Interstate Commerce Commission.*)

Coming now to discuss the merits of the case, we propose to consider:

First. The power of the Commission to fix rates.

Second. The reasons which influenced the Commission in fixing these rates; and

Third. The assertion of the railroads that the rates fixed are unreasonable or below the cost of service.

FIRST.

As to the power of the Interstate Commerce Commission to fix rates.

A large part of the assignment of errors relied upon by the railroads in this case challenges the power of the Interstate Commerce Commission to fix any rates whatever (Rec., 388, 389, 390); maintaining that the interstate-commerce act is unconstitutional; that the fixing of a rate is not a regulation of commerce;

that the act delegates legislative power to the Commission; that it unites in one body legislative, judicial, and executive functions; and, finally, that the penalties imposed by the act are so severe as to amount to a deprivation of property without due process of law.

We shall not reargue these questions. They are all now settled by the decisions of this court.

That Congress itself may fix interstate railroad rates follows inevitably from the decision in *Gibbons* v. *Ogden* (9 Wheat., 1), and is expressly asserted in many cases. (*Wabash, etc., R. R. Co.* v. *Illinois*, 118 U. S., 557; *Phila. S. S. Co.* v. *Penn.*, 122 U. S., 326; *Northern Securities case*, 193 U. S., 197, 368.)

That the fixing of a rate is a regulation of interstate commerce is not open to dispute. (*Maximum Rate cases*, 167 U. S., 479; 162 U. S., 184; 162 U. S., 197; *Smyth* v. *Ames*, 169 U. S., 466; *Wabash R. R. Co.* v. *Ill.*, 118 U. S., 557.)

That Congress may confer upon a commission power to ascertain what rate as a maximum will be just and reasonable and to prescribe and enforce that rate is now conceded.

Missouri River Rate Cases (*Interstate Commerce Com.* v. *C., R. I. and P. Ry. Co.*, and *Same* v. *C., B. and Q.*, 218 U. S., 88, and 218 U. S., 113; *Interstate Commerce Com.* v. *Stickney*, 215 U. S., 98; *Interstate Commerce Com.* v. *C., N. O. and T. P. Ry. Co.*, 167 U. S., 479, 494).

That the power thus exercised by the Commission does not constitute the usurpation of legislative or

judicial functions, or unite in one body conflicting governmental authority, but consists merely in the ascertainment of facts upon which operates the general rule of Congress prescribing just and reasonable rates, is now fully established by cases in which the same or similar questions were involved. (*St. Louis, Iron Mt. and So. Ry. Co.* v. *Taylor*, 210 U. S., 281; *Railroad Commission Cases*, 116 U. S., 307; *Reagan* v. *Farmers' Loan and Trust Co.*, 154 U. S., 362; *Field* v. *Clark*, 143 U. S., 693; *Buttfield* v. *Stranahan*, 192 U. S. 470; *Union Bridge Co.* v. *United States*, 204 U. S., 364.)

That the penalties imposed by the interstate-commerce act do not amount to a deprivation of property because, first, no penalites are sought to be recovered in this case. and, second, the penalty provision is separable from the remainder of the statute, is fully sustained in the *Commodities Clause Cases* (213 U. S., 366, 417), where a similar penalty clause was examined.

SECOND.

As to the reasons which influenced the Commission in fixing the rates.

The real gist of the railroads' complaint in this case is that the Commission heard testimony as to the circumstances under which the old rate of $3.10 had been established by the carriers and maintained for several years and, after being once increased and again restored, was finally supplanted by the new $5 rate which the shippers made the subject of their appeal for relief.

The railroads claim that the Commission took nothing into consideration except the railroads' course of conduct toward the shippers, and having found that this was not characterized by good faith, concluded that the shippers were entitled to a reduction in rates.

There is no merit in this contention, and the Circuit Court, after a full examination of the proceedings before the Commission, rejected such a claim as not justified by the facts. The court below says:

> In the case in hand, the main point relied upon by the counsel for the complainants at the bar was that it appears upon the face of the findings and decision of the Commission itself that it did not fix the rate of $3.40 on the lumber in question as a reasonable rate, in and of itself, but only as a reasonable rate in view of the conduct of the railroad company, under and by reason of which the complainants established their mills and produced the traffic. *We do not so interpret the findings and report of the Commission.* (Rec., 365.)

Then, after reviewing the report of the Commission at length the court below says that, while it appears that the Commission considered the conduct of the railroads under which the lumber men had developed their industry in the Willamette Valley,

> The Commission * * * by no means limited the basis of its decision to the past action of the railroad companies. (Opinion of the court below, Rec., 371.)

Finally, the Circuit Court, summing up the proceedings and findings before the Interstate Commerce Commission, declares that the Commission—

> expressly found that the old rate of $3.10 established by the railroad company paid an average return to it of about five mills per ton mile, and that while that rate was a low one, it did yield when established, has ever since yielded, and would for the future yield, a substantial return over and above the cost of operation. (Rec., 373.)

Then the court concludes as follows:

> In view of that finding, we can not say that its increased rate to $3.40 per ton is so unreasonable as to come within any inhibition of the Constitution of the United States. (Rec., 373.)

This unanimous opinion of the Circuit Court expresses the view that will at once commend itself to any one who examines these proceedings before the Interstate Commerce Commission.

It is true that the complaining shippers urged a special grievance in the fact that they had been induced by the promise of the railroads, when the $3.10 rate was established, to build their mills and locate their industries along the line of these roads in the Willamette Valley; that the railroads had for many years maintained this rate, and that suddenly to increase it to $5 per ton would completely destroy their business. It is true that the Commission heard these circumstances recited, and listened to statements from both sides on the subject. It is

true also that some members of the Commission thought that this breach of faith on the part of the railroads was not fair to the shippers.

But it is not true that the Commission based its findings, or the rates it prescribed, upon these facts, for, independently of every other consideration, the Commission, as we shall presently show, expressly found that the old rate of $3.10 per ton established and maintained for several years by the railroads, was, although low, in itself sufficient to afford a profit to the railroads; that the $5 rate substituted by the railroads was unreasonable for the service performed, and that the $3.40 and $3.65 rates, respectively, prescribed by the Commission, were just and reasonable and produced a fair, remunerative return for the transportation.

Inasmuch as the only point really insisted upon by the appellants in this case is that the Commission gave a wrong reason for its action, it seems proper to consider this branch of the case in detail. We submit, therefore, these propositions.

(a) No expressions in the opinion of the Commission can be used to defeat its order if the order is otherwise lawful.

Appellants seem to assume that the judicial review of orders by the Interstate Commerce Commission constitute the courts appellate tribunals, and that if the court finds that the Commission admitted some testimony that the court would not have admitted, or adopted some method of inquiry which the court would not have adopted, then the rate prescribed by

the Commission must be set aside, even though it does not appear that there was no evidence before the Commission to justify its action, and even though it does not appear that the rate prescribed was so unreasonable as to deny constitutional rights of property. There is no justification for such a view of the independent provinces of the Commission and the court.

In no case does it appear that an order of the Commission otherwise lawful would be set aside by the court simply because of the expressions of opinion or of views by the commissioner writing the report, whether such views are sound or unsound. On the contrary in the only case in which this court directly considered the weight to be given to reasons assigned by the Interstate Commerce Commission for its orders it expressly held that if an order was otherwise lawful the court would enforce it, even though the Commission gave a wrong reason for it.

In *Southern Pacific Co.* v. *Interstate Commerce Com.* (200 U. S., 536) the court say at pages 556, 557:

> We think that the court was not confined to those grounds [assigned by the Commission], and if it found the rule was, in itself, for any reason illegal as a violation of the act, the order might be valid and be a lawful order, *although the Commission gave a wrong reason for making it.* * * * All the facts being brought out before the Commission or the court, the court could decide whether the order was a lawful one, without being confined to the reasons stated by the Commission.

Of course if the Interstate Commerce Commission should make an order fixing maximum rates upon the sole basis of facts not related in any way to the reasonableness of the rates considered, it might be contended that it was beyond the scope of its power, even though the rates prescribed were not violative of constitutional rights; but where it appears not only that the rates fixed by the Commission were found to be just and reasonable within the constitutional protection, but that the Commission found the rates established by the carrier to be unjust and unreasonable, after a hearing in which testimony was adduced to support such a finding, independently of every other consideration, then it would seem clear that even if among the reasons given for its finding a wrong one should appear the court will not set aside the order.

It must be remembered that the Interstate Commerce Commission is not a court. It is not governed by technical rules of law with respect to the admission of evidence. (*Interstate Commerce Com.* v. *Baird,* 194 U. S., 25, 44.) By section 13 of the interstate-commerce act as amended, where a complaint is made, it is provided that—

> It shall be the duty of the Commission to investigate the matters complained of *in such a manner and by such means as it shall deem proper.*

It becomes, therefore, unimportant what testimony is introduced before the Commission or what opinion is expressed by the member writing the report so

long as it appears that a hearing was granted upon the question of the reasonableness of the rates involved and some testimony was adduced upon that subject and a finding made that the rates in effect were unreasonable and the rates prescribed were reasonable.

The function of rate making is legislative in character. When a rate is fixed by the Commission it becomes, as Mr. Justice Miller said in *Chicago, Milwaukee and St. Paul R. R. Co.* v. *Minn.* (134 U. S., 418), "the law of the land" with the same force and efficacy as if the very figures in the Commission's order were written into the statute.

The chief function of the court, therefore, is to consider not the method by which the result was reached, but whether or not the rate prescribed is so low as to contravene the constitutional provisions for the protection of property.

As Mr. Justice Harlan said in *San Diego Land Co.* v. *National City* (174 U. S., 739)—

> Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for a public use (p. 754).

To the same effect are several very recent decisions of this court. (*Knoxville* v. *Water Co.*, 212 U. S., 1; *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S., 210; *Willcox* v. *Consolidated Gas Co.*, 212 U. S., 19.)

(b) The Commission had a right, in determining the reasonableness of rates involved, to consider the effect of the advance by the railroads from $3.10 to $5 per ton upon the transportation of lumber.

The record in this case shows conclusively that the advance in rates made by the railroads in 1907 from $3.10 to $5 per ton for the transportation of the class of lumber here involved, would, if permitted to stand, simply stop such transportation altogether. This advance of $1.90 per ton would be equivalent to $3.13½ per thousand feet, whereas the total profit in the manufacture of this lumber in the Willamette Valley during the last seven years has ranged from $1.50 to $2.50 per thousand feet. In other words, the increase in the cost of transportation completely destroys the mills. (Report of the Commission, Rec., 15 to 28.)

It follows that the $5 rate, being absolutely prohibitive of any traffic, *amounts to a withdrawal of transportation facilities.*

Can it be said that the Interstate Commerce Commission erred in taking these facts into consideration in determining what, under all the circumstances, would be a reasonable rate? The railroads induced the manufacturers and shippers of lumber to locate along their lines. They assumed the duty of affording transportation. Could they thereafter cease to furnish such transportation by putting a price upon it which amounted to a refusal to haul the lumber to market at any price? It may be admitted that even though a railroad company has assumed the duty of furnishing transportation to a community

by the construction of its line and the offer of its facilities, it may nevertheless refuse to continue such facilities at a loss. But where it does not appear that a continuance of the facilities would compel a service below cost, and where the only question is a difference in the amount of profit, it would seem appropriate that the public authority fixing the rate should take into consideration the duty of the railroad to continue the facilities in determining what would be a reasonable rate.

This court in *Atlantic Coast Line R. R.* v. *North Carolina Corp. Com.* (206 U. S., 1) refused to set aside an order of a state commission which required the railroad to put on an additional passenger train at a daily cost of operation of $40, with probable daily receipts of $25. The position taken by the court was that where the duty rests upon a carrier to furnish facilities to the public—

> that duty may well be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not in and of itself necessarily give rise to the conclusion of unreasonableness. * * * As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance.

There is no difference in principle between requiring a railroad company to operate a particular passenger train, even at a loss, where the circumstances have imposed the duty upon the company, and requiring a railroad to transport a particular class of freight at some rate which will make possible the furnishing of the facility, even though a loss should result, if circumstances have imposed upon the company the duty of supplying the transportation. And the case is a much stronger one where it does not appear that the rate required will result in a loss to the company; and where it does appear, as in the case at bar, that the Commission, authorized to examine the question, has found that the particular rate prescribed will yield a full and fair return for the service performed.

(c) In determining what was a reasonable rate, the Commission was right in considering, as an item of evidence, the fact that the railroads had voluntarily established and long maintained a rate of $3.10 for the service.

The objection of the railroads to the consideration, by the Commission, of any circumstances connected with the original establishment of the $3.10 rate and the subsequent withdrawal, restoration, and final substitution of a $5 rate comes at last to this: That the Commission had no power, in determining what was a reasonable rate, to admit any evidence of the rates the railroads themselves had fixed from time to time.

Yet the very best evidence of what is a reasonable rate is what the railroads have been in the habit of charging. It is never possible to ascertain with

mathematical exactness what rate on a particular commodity will pay the cost of transporting that commodity, together with a fair profit to the carrier.

As pointed out by Commissioner Harlan in *Frye* v. *Northern Pacific Ry. Co.* (13 I. C. C. Rep., 501, 507, 508):

> There is a wide difference in the character of testimony required to test the reasonableness of an entire schedule of rates covering the whole traffic of a particular carrier and that required to test the reasonableness of a rate on a particular commodity between two definite points. * * * Certainly the present state of the science of railway accounting does not enable us * * * to fix with certainty a reasonable rate upon a particular commodity between two points.

For these reasons the best evidence of the reasonableness of a particular rate between two points will often be either what the same or similar commodities are carried for on other roads, or what the railroad whose rate is attacked has voluntarily charged in the past. Of course the voluntary establishment of a rate is not conclusive as to reasonableness. But, as the Interstate Commerce Commission has said in another case (8 I. C. C. Rep., 561, 568),

> When a railway company advances a rate which has been for some time in force, the fact of its continuance is in the nature of an admission against that company, which tends to show the unreasonableness of the advance.

Finally, as this court has several times declared, it ought not to be assumed that a carrier has for years voluntarily performed an unremunerative service, and therefore a rate established and maintained by the railroads affords at least some indication of reasonableness and may properly be considered in any investigation of rates. (*Covington Stockyards* v. *Keith*, 139 U. S. 128; *Interstate Commerce Commission* v. *Chicago, etc., R. R. Co.* 186 U. S. 320.)

(d) The record shows that the Commission heard voluminous testimony on the subject of the reasonableness of the rates with relation to the cost of the service, the revenues of the carriers, and the charges for the transportation of similar commodities.

The testimony and exhibits before the Commission cover nearly three hundred pages of the record. They show that the Commission examined the whole question thoroughly and considered every fact and circumstance adduced by either side, which tended to show what rate would be just and reasonable in relation to the service performed, the cost of operation, and the revenues of the carriers. The physical condition of the road was examined (Rec., 180); the rates on lumber from other Southern Pacific points (Rec., 198); the class rates and local tariffs (Rec., 199 to 208); the prevailing market price for a number of years for the lumber shipped (Rec., 209); the history of the rates on lumber from various points on the Southern Pacific lines in Oregon to various points in California (Rec., 210, 212); the schedules of

various freight trains and the loads carried (Rec., 214, 222); the record of lumber shipments between various points (Rec., 223, 224); the freight tariffs of the Southern Pacific lines in Oregon (Rec., 229, 256, 283); the tariffs on lumber and lumber products of the Southern Pacific Company (Rec., 285, 329); and the rates on various other commodities moving between the same points, and requiring substantially the same service as that involved in the transportation of green fir lumber (Rec., 230–283, 384).

The reasonableness of the $3.10 rate in and of itself was considered (Rec., 22, 24, 123), Commissioner Prouty saying, at page 123 of the record, that the question was whether or not that rate could be maintained "with a reasonable profit," or whether a higher rate would be necessary in order to yield a reasonable profit. "In other words," says the Commissioner, "it would make a difference, in my opinion, as to whether this was a fairly good business on the $3.10 or the $4 or $5 rate, or whether there was no money in it at all."

The reasonableness of the $5 rate in and of itself was considered. (Rec., 63, 65, 101, 122, 124, 189.) At pages 63 and 65 of the Record it was sought to make counsel for the shippers admit that the $5 rate was reasonable and the statement is made that without regard to the promise of the railroads to maintain a $3.10 rate the new rate of $5 is unjust and unreasonable.

The earnings, cost of operation, and other items directly bearing upon the service were fully inves-

tigated. At page 179 of the record it appears that the earnings of the railroad in the State of Oregon during the period when the $3.10 rate was in effect had largely increased, notwithstanding the fact that its roadbed had been improved, new rails had been laid, and larger locomotives put in operation. At pages 22 and 23 of the record it appears that the Southern Pacific Company, which owns the stock of the Oregon and California, in 1897, before the $3.10 rate was put into effect, realized gross earnings in the amount of $1,436,037 and net earnings of $323,000, while in 1907, after the operation of the $3.10 rate, its gross earnings were $6,417,000 and its net earnings were $1,650,000. In other words, during these ten years there had been an enormous increase in net earnings and such net earnings were, at the time the complaint was heard by the Commission, $2,500 per mile.

A comprehensive statement of the earnings and expenses, traffic, operating, and financial statistics of the two companies appears in the record at pages 376 to 385.

(e) The record shows that the Commission did not limit the basis of its order to the past conduct of the railroads, but, independently of any so-called estoppel, expressly found the $5 rate to be unreasonable and the rates prescribed to be reasonable.

Upon the testimony above referred to the Commission made its findings and order, and while it is true that it considered the circumstances under which the railroads had originally established the

$3.10 rate and subsequently supplanted it with the $5 rate, it is perfectly clear from an examination of all the proceedings that the Commission did not regard these circumstances alone as the basis for its order, but proceeded independently of them to find the $5 rate unreasonable and the rates prescribed reasonable.

This was the view taken by the court below and is fully justified by a consideration of all the proceedings.

In the first place, it appears at the hearing (Rec., 141, 142) that the Commission desired, preliminary to any consideration of the reasonableness of rates, to ascertain what the earnings of the roads were for the transportation of the very lumber involved and what was the cost of operation.

The following abstracts from the record (pp. 141, 142) show this conclusively:

> Commissioner PROUTY. We ought to have, if it can be furnished, a statement showing the earnings from the movement of lumber on this railroad in question, from Portland to San Francisco. [Thus embracing all movements in the Willamette Valley.]

It then appearing that counsel for the shippers had asked for a statement covering the entire Southern Pacific system, the following colloquy occurred (Rec., 142):

> Commissioner PROUTY. We do not want that; but it seems to me that this Commission ought to know, *before it passes on this question,*

substantially what your earnings are on this railroad.

Mr. COTTON. There is no objection to that at all.

Commissioner PROUTY. What your train mileage cost is, for example, on this railroad and what your earnings for a specified period under the $3.10 rate were from lumber on this railroad, *and other general facts of that sort,* so as to give us some general idea as to what it costs to operate trains on this line between Portland and San Francisco.

Then follow various requests on the part of counsel for the shippers for information from the railroads, such as, the number of cars used for the shipment of lumber; a tabulated statement showing the car movement of lumber and lumber products over the road in the Willamette Valley and over the various branch lines; the division of revenues and operating expenses between the Southern Pacific and the Oregon and California roads and other like matters. With respect to some of these items it was claimed that the records had been destroyed and all the information could not be furnished.

At pages 146 to 161 of the record there appear various requests by the Commission for specific information to be furnished by the railroads bearing upon the amount of lumber shipped; the total number of cars in operation during certain periods; the average carload of lumber; the size of the trains; the entire lumber earnings as compared with entire freight earnings for specific periods; the total earn-

ings of the road including passenger and freight earnings; the percentage of operating expenses; the earnings per train mile from freight alone; the operating cost per train mile; the annual reports to stockholders; class rates and commodity rates on standard articles, and various other facts necessary to an approximate ascertainment of the exact cost of the service here involved, the earnings upon it, and the effect of particular rates.

The statements furnished in answer to this request of the Commission appear in the record, 194 to 330.

Certainly the call for such information and the consideration of it by the Commission do not support the view that the Commission intended to base its order entirely upon some promise of the railroads to maintain a particular rate, but intended to consider the reasonableness of rates independent of any such promise.

In the opinion of the Commission, which appellants claim evidences an intention to base the order entirely upon the moral obligation of the railroads to maintain a lower rate, the very contrary appears. At page 23 of the record this abstract is taken from the Commission's opinion:

> The complainants earnestly insist that we may and should look into the past history of this rate in disposing of this question.
>
> It is not claimed that the defendants were under contract with any one shipper, nor with the general body of shippers in that region, to maintain the $3.10 rate. *It is doubtful if such a contract would be valid.* At any

> rate no such contract was ever made. While the defendants announced that they would establish a rate of $3.10, they never stated that they would maintain this rate in effect for any given length of time.

And further, at page 24, it is apparent from the opinion of the Commission that no order would have been made reducing the rate if the complainants had relied solely upon supposed equities between them and the railroads and if the facts in evidence before the Commission had not shown that a lower rate could be prescribed without seriously impairing the revenues of the roads or requiring them to perform the service without a fair profit. The Commission says:

> The expense of handling traffic under this rate ($3.10) is not greater than the revenue, thereby occasioning a loss which must be made up upon other business. *Such a rate would present an entirely different question from that before us.* Here the business is remunerative directly, beside being highly beneficial to the defendants indirectly.

Again, at page 22, in referring to the former $3.10 rate established by the railroad, the Commission says:

> The $3.10 rate was certainly a low one, but we are satisfied that it did yield when established, has ever since yielded, and would for the future yield a substantial return over and above the cost of operation and that its maintenance in the past has contributed much to the prosperity of the defendant.

Finally, the Commission makes this finding with respect to the reasonableness of the $5 rate complained of by the shippers (Rec., 26):

> We are of the opinion, then, that the present rate of $5 from all mills in the Willamette Valley, not including Portland, is unjust and unreasonable; that for the future from mills upon the east bank, and upon the west bank south of Corvallis that rate should not exceed 17 cents per hundred pounds, or $3.40 per ton, upon rough, green fir lumber and lath, and that from points upon the west bank north of Corvallis it should not exceed $3.65 per ton.

Even the dissenting opinion of two members of the Commission (Rec., 27) does not justify the claim of the railroads in this case that the Commission based its order solely upon matters of estoppel. In this dissent the statement is made that the opinion of the Commission "seems largely to rest" on such matters of estoppel. But that the reasonableness of the rates, independently of all other matters, was directly in issue is shown by the statement in the dissenting opinion, in which it is said:

> For these reasons *and also because I consider the present rate not to be an unreasonable rate* I am constrained to withhold my assent to the disposition made of the complaint.

If there had been no evidence before the Commission touching the reasonableness of the rate, independently of all other considerations, the commissioner dissenting could not have reached the

conclusion that he considered the rate of the railroads to be reasonable.

It is suggested finally on this question as to the basis of the Commission's order that some consideration may very properly be given to the answer of the Commission in this case. (Rec., 338, 346.) In this answer the following allegations are made:

> This defendant denies that it did not find the rate of $5 per ton to be unreasonable, and avers that it did find such rate to be unreasonable and unjust. This defendant admits that it did find the rate of $3.10 to be a low rate, but it denies that it found such rate to be unreasonably low. Defendant denies that the rate of $3.40 and the rate of $3.65 are substantially the same as the rate of $3.10. Dedendant avers that green fir lumber and lath is and can be carried by complainants without appreciable risk of damage in transit. It moves in volumes regularly throughout the year, is hauled on the least expensive cars, and is loaded and unloaded by the shipper or consignee. It is an article of wide consumption, and is entitled relatively to as low a rate as is provided for any other commodity.
>
> Defendant denies that the rates of $3.40 and $3.65 per ton, as ordered and prescribed by it, were or are unreasonably low rates; * * * denies that said rates are * * * less than what is just and reasonable for the service rendered; and denies that said rates do not * * * pay the cost of the service rendered. Avers that the rates prescribed in

> this order and made the basis of this suit are just and reasonable and in every sense remunerative to the carrier and are just to the shippers and to the public.

THIRD.

As to the assertion of the railroads that the rates established by the Commission are unreasonable or below the cost of service.

Upon the issue whether the rates prescribed by the Commission are unreasonably low, or below the cost of service within the constitutional inhibition, the case comes here upon this state of the pleadings:

The railroads in their bill of complaint (Rec., 45) allege that the rates prescribed by the Commission are unreasonable and below the cost of service. The Commission in its answer denies this allegation, and avers that such rates are just and reasonable and "in every sense remunerative to the carriers." (Rec., 346.) The replication of the railroads is of no importance, since it is merely the formal assertion that they will prove their bill. (Rec., 361.)

Upon this state of the pleadings the Circuit Court said:

> The pleadings, as changed since the case was last presented to the court, no longer raise the point, then made, that the rates so fixed were below the cost of transporting the lumber. (Rec., 365.)

We submit that this is correct. But in any event, since the railroads have attacked the lawfulness of the rates prescribed by the Commission the burden was

upon them to show that the rates so fixed were below the cost of service or so unreasonably low as to amount to a confiscation of property. *They introduced no testimony whatever, either before the Commission or the court below, which proves or tends to prove this allegation in their bill of complaint.*

In the final analysis the issue in this case is whether or not the rates fixed by the Commission are so low as to constitute a deprivation of property. Upon that issue we have, on the one hand, the express finding of the Commission in its report and order that the rates prescribed are reasonable and remunerative, together with a volume of testimony as to the character of the service, the cost of operation, the lumber rates elsewhere in the same vicinity, the rates on other like commodities, and the gross and net earnings of the roads during the period covered by the controversy. On the other hand, we have merely the assertion of the railroads that, in their opinion, the rates fixed by the Commission are too low.

Certainly under these circumstances the case does not present "clearly and beyond all doubt," as this court said in *Land Co.* v. *National City* (174 U. S., 739)—

> Such a flagrant attack upon the rights of property * * * as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation (p. 754).

Certainly the rates thus fixed do not come within the rule stated by this court in *Willcox* v. *Gas Co.*

(212 U. S., 19) that in order to justify judicial interference—

> The rates must be plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as under the circumstances is just both to the owner and the public.

That the burden is upon the railroads complaining of the order to show that the rates prescribed by the Commission constitute a deprivation of property is decided by this court in *Minneapolis and St. Louis Ry. Co.* v. *Minnesota* (186 U. S., 257), where Mr. Justice Brown says, at page 267:

> We don't think it beyond the power of the state commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that *the burden is upon them to impeach the action of the commission in this particular.*

An important consideration in this case is the amount of traffic involved. The record shows (p. 20, 21) that the total shipment of lumber from the Willamette Valley to all points in 1907 (when the new rate complained of was put into effect by the railroads) was about 12,500 cars, and of these only about 1,000 cars were affected by the order of the Commission. In other words, *only 8 per cent of one commodity, out of all the business transacted by the companies, is affected by this order.* How can it be said that such an infinitesimal portion of the

total business of the railroad, inseparable from such total business, and incapable of exact mathematical calculation as to cost and profit, can be so affected by a rate as to constitute a confiscation of property, where the total business of the road shows a large increase in annual net earnings, under a rate even lower with respect to the particular commodity?

The authorities are uniform upon the point that even though the rate prescribed by a Commission for the transportation of a particular commodity would, if made the basis of all rates on all business done by the road, result in requiring the operation of the road below the cost thereof, still if the rate prescribed is not for a distinct and separable service and if it appears that notwithstanding such a rate the road is enabled to earn a fair return upon all its business, the rate so prescribed will not be condemned as a deprivation of property. (*Minn. and St. Louis R. R.* v. *Minnesota*, 186 U. S., 257; *Atlantic Coast Line R. R.* v. *N. C. Cor. Com.*, 206 U. S., 1; *St. Louis and San Francisco R. R. Co.* v. *Gill*, 156 U. S., 649.)

In the case at bar the rate of $3.40 for the transportation of green fir lumber from certain points on the Willamette River to San Francisco, and the rate of $3.65 for such transportation from certain other points on the Willamette River to San Francisco are 30 cents per ton higher than the rates which the railroads established and long maintained for the same service; and it appears that while the $3.10 rate was in effect the general earnings of the roads increased, notwithstanding extensive improvements

and betterments, until they reached more than $2,500 annually per mile. Cases such as the *Southern Ry. Co.* v. *St. Louis Hay and Grain Co.* (214 U. S., 297) and others of similar import, do not apply here for the reason that they show instances of a distinct service entirely separable from the general business of the roads, the exact cost of which was easily ascertainable, and where it was admitted that the Commission had fixed a rate below such cost. But where, as in the case at bar, no attempt is made by the railroads to show the exact cost of the transportation of a ton of lumber from the Willamette Valley to San Francisco, no testimony is introduced by the roads tending to prove that the rates for this particular service prescribed by the Commission are below the cost of such service, and where the particular service constitutes an inappreciable portion of the total business of the roads and the total business is admitted to be profitable, there is no authority to justify an annulment of the Commission's order.

Counsel for the appellants rely chiefly upon the case of *Cotting* v. *Kansas City Stock Yards* (183 U. S., 79) in support of their claim that in reducing a rate the Interstate Commerce Commission must always be able to demonstrate mathematically that the rate prescribed will afford a fair and full return upon the transportation of the particular commodity, and that even though the great bulk of business of the railroad is not affected by the order and is admitted to be profitable as a whole, notwithstanding such

order, still this mathematical demonstration of cost and profit must be made with respect to the particular commodity carried. There is no such principle announced in the *Cotting* case. Indeed, the opinion in that case expressly points out the difference between a purely public service, such as railroads are engaged in, and a private business, such as stock yards conduct; and further, it appears that a majority of the court based their conclusion wholly upon the ground that the statute involved was a violation of the Fourteenth Amendment to the Constitution in that it applied only to the Kansas City Stock Yards Company and not to other companies or corporations engaged in like business in that State. No case is or can be cited which qualifies the decisions in the *Minnesota* case (186 U. S., 257), the *Atlantic Coast Line* case (206 U. S., 1) and the *Gill* case (156 U. S., 649), which clearly uphold the view that an order of a commission fixing a rate will not be set aside as a confiscation of property, even though the rate prescribed is less than the cost of the service, if it appears that the total business of the company is not injuriously affected or rendered unprofitable. And in the *Minnesota* case, *supra*, Mr. Justice Brown declares that the burden is upon the railroads to show that the order of the Commission has this effect.

In the case at bar there is not only no claim that the rate prescribed requires the operation of the roads at a loss, but it is admitted that the earnings and profits of the roads have greatly increased under a lower rate for the transportation of green fir lumber

in the Willamette Valley. And further, in the case at bar, it does not appear from any testimony that the particular service to be performed for the rate fixed by the Commission will not yield a fair and full return upon the cost of performing such particular service, and the express finding of the Commission, from the evidence adduced, is that the rates fixed will in fact pay such fair and full return.

In one of the assignments of error appellants complain that the court below erred in dismissing the plaintiff's bill because it appeared that the Commission in fixing the rate took into consideration matters in their official cognizance.

There is no error in this and certainly no prejudice. It appears from the context of the stipulation (Rec.; 374, 375) that counsel on both sides had in mind such matters as the reports and tariffs required by law to be filed with the Commission, made public records by the interstate commerce act, and "received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings." (Section 16, interstate-commerce act as amended June 29, 1906.) There are no other matters conceivable which may be said to be within the "official cognizance" of the Commission, unless they be facts such as the general topography of the country, the distance between certain points, the capacity of cars, the bulk and convenience of handling certain commodities and other like things of which the Commission may, without testimony, take official notice.

Doubtless this is what this court had in mind in a recent case where the fact is recognized that the Commission may reach its conclusion, not only from the testimony of witnesses but from its own knowledge of conditions. Speaking of the weight to be given, a finding of the Commission, it is said in *Ill. Cent. R. R. Co.* v. *Interstate Commerce Com.*, 206 U. S., at page 454, that the Commission—

> in addition to "knowledge of conditions, of environment, and of transportation relations," has had the witnesses before it.

CONCLUSION.

In submitting this case it is respectfully suggested that every intendment of law and fact should avail to support the order of the Commission and the decree of the court below. The matter of these lumber rates has been thoroughly examined. There has been a full hearing. The order was made "*after both parties had announced that they had no further evidence to present.*" (Rec., 342.) The Commission expressly found that the $5 rate fixed by the railroads was unjust and unreasonable. It prescribed a rate 10 per cent higher than that which the railroads had themselves long maintained; it found that the rate so prescribed was just, reasonable, and fairly remunerative and the railroads offered no evidence whatever to the contrary.

Counsel for the appellants confuse the issue in this court as they did at both hearings in the court below, by assuming that the courts are concerned with

the reasonableness or unreasonableness of the old $3.10 rate, or with the reasonableness or unreasonableness of the $5 rate, whereas the only question with which the court is concerned is whether or not it clearly appears that the rates of $3.40 and $3.65 respectively prescribed by the Commission are so low as to amount to the taking of property without due process of law.

A rate of $3.10 might be unreasonably low, but it does not follow that a rate of $3.40 or $3.65 would be unreasonably low. A rate of $5 might not be so high as to be beyond any justification but it does not follow that a rate of $3.40 or $3.65 would be too low.

The Commission was concerned with the $5 rate only for the purpose of ascertaining whether or not it was unreasonable, and it was concerned with the $3.10 rate only as an item of evidence to assist in determining what would or would not be reasonable. But the court is concerned only with the rates of $3.40 and $3.65, which were prescribed by the Commission. And as to them there is no testimony to contradict the conclusion of the Commission.

The first duty of the Commission, on complaint of the shippers, was to inquire into the reasonableness of the $5 rate complained of, to grant a hearing, and to take testimony. When that was done, the next duty of the Commission, if it found the existing rate to be unreasonable, was to prescribe a rate which in its judgment would be just and reasonable. When that was done, and the railroads challenged the va-

lidity of the Commission's order in the courts, the burden was upon the railroads to show that the rate prescribed by the Commission was so low as clearly to confiscate their property. Having failed to do so, the order of the Commission must stand. This was the view taken by the Circuit Court, and the decree below should be affirmed.

Respectfully submitted.

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DECEMBER, 1910.

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